Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-384

STEVEN A. TATERKA,

Petitioner,

v.

WISCONSIN TELEPHONE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Steven A. Taterka

P.O. Box 971
Milwaukee, Wi. 53201

September 9, 1977

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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE SEVENTH CIRCUIT

Petitioner, Steven A. Taterka, prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 4, 1977 (rehearing denied June 14, 1977).

OPINIONS AND ORDERS BELOW

United States District Court for the Eastern District of Wisconsin

May 1, 1975, Decision and Order dismissing plaintiff's original complaint, 394 F.Supp. 862 (App. 21a-23a).

March 5, 1976, Decision and Order dismissing plaintiff's amended complaint, not reported (App. 18a-20a).

June 29, 1976, Order denying plaintiff's motion to vacate judgment (thereby not allowing filing of proposed second amended complaint), not reported (App. 24a).

United States Court of Appeals for the Seventh Circuit

May 4, 1977, Order affirming District Court dismissal of amended complaint and denial of motion to vacate judgment, not reported* (App. 10a-16a).

June 14, 1977, Order denying plaintiff's petition for rehearing, not reported (App. 17a).

*The Court of Appeals ordered that its six page per curiam opinion in this case be unpublished (unreported) per Seventh Circuit Rule 35. Petitioner subsequently moved for its publication; the motion was denied.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 4, 1977. A timely petition for rehearing was denied on June 14, 1977. This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Is dismissal of a complaint for failure to state a claim proper where the complaint alleges a conspiracy in restraint of trade and monopolization of commerce in violation of sections 1 and 2 of the Sherman Antitrust Act arising from a "no-switching" agreement among employers whereby such employers refuse to hire employees of one another while such employees are still employed or for a period of six months thereafter and the employers dominate the industry involved?

II

Does an employee denied employment as a result of such a no-switching agreement have standing to bring suit for lost wages under section 4 of the Clayton Antitrust Act?

III

Is it an abuse of discretion for a district court to deny a plaintiff's timely motion to vacate judgment (pursuant to Rule 59(e), Fed. R.Civ.P.) where the granting of such motion would permit the filing of a proposed second amended complaint and no prejudice to the defendant would result?

STATUTORY PROVISIONS INVOLVED

Sherman Act, § 1 (15 U.S.C. § 1)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . [Resale price maintenance is omitted]. . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, § 2 (15 U.S.C. § 2)

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished

by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act, § 4 (15 U.S.C. § 15)

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The subject of this litigation is an alleged "no-switching" agreement by which Bell System telephone companies, including the respondent, do not hire persons employed by other Bell System companies while they are still employed by such other Bell System companies or for a period of six months afterwards. In this suit petitioner seeks that the no-switching agreement be declared in violation of the antitrust laws and that he recover lost wages incurred as a result of respondent's adherence to that agreement. It is petitioner's position that the anti-competitive effects of the no-switching agreement, as alleged in the second amended complaint (App. 1a-8a), render adherence to it by the respondent and other Bell System companies in violation of sections 1 and 2 of the Sherman Antitrust Act and that petitioner has standing to bring suit under section 4 of the Clayton Antitrust Act.

Basis for Federal Jurisdiction

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1337.

Facts

From November, 1970, until October, 1972, when he resigned, the petitioner (plaintiff) was employed as a switchman with the New York Telephone Company, a Bell System company. As a switchman plaintiff's duties included the maintenance and repair of telephone company switching equipment.

The respondent (defendant) telephone company is engaged in the business of providing communications to points within Wisconsin and, in interstate commerce, to points outside the state of Wisconsin. In conducting its operations the defendant operates telephone central offices and related transmission facilities through which approximately seventy-two percent of the telephones in the state of Wisconsin are operated, the remainder being operated by non-Bell operating companies generally referred to as "independents". The defendant is also engaged in supplying and servicing telephone equipment located on customers' premises in competition with various "interconnect" companies.

At all times material to this action, the defendant, a Bell System company, participated in a "no-switching" agreement with other companies of the Bell System. Under the no-switching agreement Bell System companies would not hire persons employed by other Bell System companies while still employed by such other Bell System companies or for a period of six months afterwards. Although there did exist a procedure by which Bell System employees might transfer from one Bell System company to another, such

procedure was subject to approval of both the Bell System company an employee wished to transfer to and the Bell System company he wished to transfer from. Refusal by a current Bell System employer to grant approval precluded the possibility of a transfer. A Bell System employee who resigned his employment was unable to secure employment with any Bell System company for a period of six months following such resignation.

In July, 1971, plaintiff, while still employed by New York Telephone but unable to work because of a strike then being waged against that company, sought employment with the defendant. Because of the no-switching agreement, he was not permitted to fill out an application for employment. In October, 1972, plaintiff resigned his employment with New York Telephone and on December 1, 1972, again sought employment with the defendant. At no time has the defendant offered plaintiff any type of employment.

Lower Court Proceedings

The original complaint in this suit contained two causes of action. The first cause of action involved a claim under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000e et seq.). The second cause of action set forth the plaintiff's antitrust claim arising from defendant's adherence to the alleged no-switching agreement.

The defendant moved to dismiss both causes of action pursuant to Rules 12(b)(1) & (6), Fed.R.Civ.P., on the grounds that the court lacked jurisdiction over the subject matter and that the plaintiff failed to state claims upon which relief could be granted. In a decision and order dated May 1, 1975, the

District Court, Honorable Myron L. Gordon presiding, granted defendant's motion to dismiss both causes of action. Taterka v. Wisconsin Telephone Co., 394 F.Supp. 862 (E.D. Wis. 1975) (App. 21a-23a).

Subsequently the plaintiff filed an amended complaint alleging both the Title VII and antitrust claims. The defendant again moved to dismiss pursuant to Rules 12(b)(1) & (6), Fed.R.Civ.P. In a decision and order dated March 5, 1976, the District Court granted defendant's motion to dismiss and ordered that this action be dismissed (App. 18a-20a).

The plaintiff then timely filed a motion to vacate judgment pursuant to Rule 59(e), Fed.R.Civ.P., in order that leave to amend be granted pursuant to Rule 15(a), Fed.R.Civ. P. The plaintiff sought that the March 5, 1976, judgment be vacated with respect to the second cause of action (antitrust claim) only. With the brief in support of the motion the plaintiff submitted a copy of his proposed second amended complaint (App. 1a-8a). On June 29, 1976, the District Court denied the plaintiff's motion to vacate judgment (App. 24a).

A notice of appeal was filed by the plaintiff on July 29, 1976. The notice of appeal specified that appeal was being taken from the final judgment dismissing plaintiff's second cause of action (antitrust claim) entered on March 5, 1976, and the denial of plaintiff's motion to vacate judgment entered on June 29, 1976.

On May 4, 1977, the Seventh Circuit Court of Appeals affirmed the District Court's dismissal of the amended complaint and its denial of the plaintiff's motion to vacate judgment. In a six page per curiam decision (App. 10a-16a) the Court held that no Sherman

Act violation was stated in the amended complaint and that there was no abuse of discretion in denying the plaintiff's motion to vacate judgment which would have permitted the filing of the proposed second amended complaint.

The Seventh Circuit's reasoning on the denial of the motion to vacate was twofold; first, said the Court, the plaintiff had amended his complaint once; and second, filing of the proposed second amended complaint would have been futile since, in the Court's opinion, it failed to state a claim. It is these issues, whether the proposed second amended complaint states a claim upon which relief can be granted (question presented no. I), and whether judgment should have been vacated to allow its filing (question presented no. III), which petitioner seeks to have reviewed in this Court.

REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit Court of Appeals in the instant case that the plaintiff's second amended complaint fails to state a claim upon which relief can be granted directly conflicts with this Court's decisions in Radovich v. National Football League, 352 U.S. 445 (1957) and Anderson v. Shipowners' Association of Pacific Coast, 272 U.S. 359 (1926), and the decision of the Second Circuit Court of Appeals in Union Circulation Co. v. Federal Trade Commission, 241 F.2d 652 (2nd Cir. 1957). All three cases involved blacklisting of employees which was found to be actionable under the Sherman Act.

I

UNDER RADOVICH V. NATIONAL FOOTBALL LEAGUE A COMPLAINT ALLEGING A CONSPIRACY BETWEEN NON-COMPETITORS STATES A SHERMAN ACT VIOLATION WHERE IT ALLEGES DAMAGE TO THIRD PARTY COMPETITORS

In Radovich a plaintiff's complaint was held to state a claim under the Sherman Act where it alleged that plaintiff had been blacklisted pursuant to a blacklisting agreement among football league teams. Radovich had been a football player with a National Football League team and left to play for a team connected with the All-America Conference, a competing league. Subsequently a Pacific Coast League team offered to employ Radovich but then refused to do so after being advised by the National Football League that Radovich was being blacklisted. Radovich brought suit under section 4 of the Clayton Act (15 U.S.C. § 15) contending that the blacklisting agreement between the National Football League and the Pacific Coast League, which was intended to destroy the All-America Conference, constituted a conspiracy to monopolize and control organized football in the United States in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). This Court reversed a lower court dismissal of the complaint holding that the blacklisting agreement involved was within the scope of the antitrust laws and that Radovich had standing to bring suit.

The Court of Appeals in the instant case indicated that it recognized that in Radovich the effect of the blacklisting agreement was anticompetitive even though the parties to the agreement were noncompetitors. Nevertheless the Court of Appeals considered the

reasoning of Radovich inapplicable here because, in the amended complaint, no third party competitors of Bell System companies were alleged to have been affected by the no-switching agreement. But under the Court's own interpretation of Radovich, the second amended complaint states a cause of action since it does allege damage to non-Bell operating companies and non-Bell interconnect companies which compete with the Bell System. Those allegations of damage to third party competitors which the Court found lacking in the amended complaint are contained in the second amended complaint. The blacklisting in the instant case, with its alleged detrimental effects on non-Bell operating companies and competing interconnect companies, is analagous to the blacklisting in Radovich which had a detrimental effect on the All-America Conference, a competing football league.

II

UNDER ANDERSON V. SHIPOWNERS' ASSOCIATION OF PACIFIC COAST THE COURT OF APPEALS SHOULD HAVE CONSIDERED THE EXTENT TO WHICH THE NO-SWITCHING AGREEMENT CONSTITUTES A RESTRAINT UPON THE ABILITY OF BELL SYSTEM OPERATING COMPANIES TO ENGAGE IN INTERSTATE COMMERCE

In an early case, Anderson v. Shipowners' Association of Pacific Coast, 272 U.S. 359 (1926), this Court considered the validity of an agreement between members of a shipowners' association which required seamen to register with the association in order to obtain employment. Refusal of the association to register a seaman precluded his employment with a member shipowner. This Court held that the shipowners, by entering into such a combination, had subjected themselves to the control of the association.

As this Court put it, they had

> "....put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce...." 272 U.S. at 365.

In the case at bar the Court of Appeals did not consider the extent to which the no-switching agreement constitutes a restraint upon the ability of Bell System companies to engage in interstate commerce. Competition for employees, insofar as it effects a business' ability to function, is no different than competition for anything else necessary to turn out a product or service. The effect therefore, of the no-switching agreement upon Bell System companies to supply telephone service is the same as the effect of the agreement among shipowners in Anderson; in both cases employers voluntarily* engaged in conduct which constitutes a restraint upon their ability to operate in interstate commerce.

*It might not be accurate to state that Bell System companies have voluntarily adhered to the no-switching agreement without knowing the extent to which American Telephone & Telegraph Company, the parent company of the Bell System, may have imposed adherence to it.

III

THE COURT OF APPEALS HAS MADE A DETERMINATION, CONTRARY TO THAT REACHED BY THE SECOND CIRCUIT IN UNION CIRCULATION CO. V. FEDERAL TRADE COMMISSION, AS TO THE FACTUAL VALIDITY OF PLAINTIFF'S ANTICOMPETITIVE ALLEGATIONS AND THUS EXCEEDED THE SCOPE OF REVIEW IN DETERMINING WHETHER A COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

The Second Circuit, in Union Circulation Co. v. Federal Trade Commission, 241 F.2d 652 (2nd Cir. 1957), considered the consequences of no-switching agreements as they affect labor markets and thus the ability of businesses to compete. In Union agencies engaged in the business of selling magazine subscriptions door-to-door had entered into no-switching agreements whereby none of the parties to the agreement would hire each other's solicitors for a period of one year after employment. In affirming the Federal Trade Commission's order enjoining the agencies from continued implementation of the no-switching agreements the Second Circuit expressed concern that such agreements would have a tendency to freeze the labor supply. The Court reasoned that, even though only signatory agencies were bound to the agreement, an employee of one would hesitate to work for a competing non-signatory agency since he knew that he would be out of work for a year if, for any reason, the latter venture did not work out. The result then, would be that the magazine selling industry would become static to the advantage of large, established agencies and to the disadvantage of infant organizations. 241 F.2d at 658.

The Court of Appeals here rejected similar reasoning. In dealing with plaintiff's allegations that Bell System adherence to the no-switching agreement created a reluctance among Bell employees to work for non-Bell operating companies and competing interconnect companies, and therefore that such non-Bell companies were placed at a competitive disadvantage, the Court concluded that such allegations were too speculative to support an antitrust claim. The Court reached this result stating that a Bell System employee contemplating going to a non-Bell company "does not appear" to face

a substantial risk of being out of work within six months and precluded from further Bell System employment. This conclusion, itself speculative, is a factual determination that does not take into account the extent to which Bell employees perceive the risk since that is enough to prevent changes in employment to non-Bell companies. The Court thus engaged in fact finding with respect to plaintiff's allegations of anticompetitiveness when the question was only whether or not the second amended complaint stated a claim upon which relief could be granted.

IV

IN DENYING THE PLAINTIFF'S MOTION TO VACATE JUDGMENT WHICH WOULD HAVE PERMITTED THE FILING OF THE PROPOSED SECOND AMENDED COMPLAINT THE COURT OF APPEALS HAS NOT FOLLOWED THIS COURT'S GUIDELINES SET FORTH IN FOMAN V. DAVIS

In affirming the denial of the plaintiff's motion to vacate judgment which would have permitted the filing of the proposed second amended complaint, the Court of Appeals departed from the guidelines set forth by this Court in Foman v. Davis, 371 U.S. 178 (1962). Foman stands for the proposition that a plaintiff is entitled to have his claim tested on the merits and thus, as Rule 15(a), Fed.R.Civ.P. provides, leave to amend should be freely given when it would be in the interests of justice.

In the case at bar the Court of Appeals refused to allow the filing of the proposed second amended complaint apparently on the sole ground, apart from its view that the proposed amendment failed to state a claim, that the plaintiff had amended once previously. The Court cited its own decision in Austin v. House of Vision, Inc., 385 F.2d

171 (7th Cir. 1967), for the proposition that a plaintiff should be afforded an opportunity to amend once yet in that case, also an antitrust action, the plaintiff was allowed to amend twice. In the case at bar the defendant would not have been prejudiced had the proposed amendment been allowed. By not allowing it, the Court of Appeals did not follow Foman's guidelines.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

Steven A. Taterka

Sept. 9, 1977

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

- -

STEVEN A. TATERKA,
Plaintiff,
v.
WISCONSIN TELEPHONE CO.,
Defendant.

SECOND AMENDED COMPLAINT

74-C-625

- -

The plaintiff, complaining of the defendant, alleges to the Court as follows:

1. This complaint is filed under Section 4 of the Clayton Antitrust Act (Title 15, United States Code, Section 15) to recover damages resulting from the violation by the defendant, as hereinafter alleged, of Section 1 of the Sherman Antitrust Act, as amended (Title 15, United States Code, Section 1), and of Section 2 of the Sherman Antitrust Act, as amended (Title 15, United States Code, Section 2). The jurisdiction of this Court is founded upon Title 28, United States Code, Section 1337.

2. At all times mentioned herein the plaintiff's occupation was that of a switchman in what is known in the telephone trade as the number 5 crossbar switching system. The plaintiff was employed in that capacity with the New York Telephone Company during the period November, 1970 to October, 1972, at which time he resigned. While employed during that period the plaintiff was trained for the position of number 5 crossbar switchman through a training course as required by New York Telephone.

3. The defendant is a corporation organized under the laws of the state of Wisconsin with its principal offices located at 722 North Broadway, Milwaukee, Wisconsin. At all times mentioned herein the defendant operated within the state of Wisconsin within the territorial jurisdiction of this Court.

4. The defendant is, and at all times mentioned herein was, engaged in the business of providing communications to points within the state of Wisconsin and, in interstate commerce, to points outside the state of Wisconsin through connection to facilities of the American Telephone and Telegraph Company.

5. In conducting its operations the defendant is engaged in:
(a) operating telephone central offices and related transmission facilities through which approximately seventy-two percent (72%) of the telephones in the state of Wisconsin are operated, the remainder being operated by non-Bell operating companies generally referred to as "independents"; and
(b) supplying and servicing telephone equipment located on customers' premises, an area in which the defendant is in competition with various "interconnect" companies.

6. At all times mentioned herein the defendant and the co-conspirators named in paragraph 9 have been engaged in:
(a) a combination and conspiracy to restrain interstate commerce in violation of Section 1 of the Sherman Antitrust Act;
(b) a combination and conspiracy to monopolize a substantial segment of interstate trade and commerce in violation of Section 2 of the Sherman Antitrust Act.
(c) an attempt to monopolize a substantial segment of interstate trade and

commerce in violation of Section 2 of the Sherman Antitrust Act; and

(d) a combination and conspiracy in restraint of trade and commerce in violation of Section 133.01 Wisconsin Statutes.

7. The acts of the defendant and named co-conspirators were done in furtherance of the separate offenses charged in the preceeding paragraph and were a part thereof and were done with the purpose of restraining trade and monopolizing commerce. It was the intent of the defendant and named co-conspirators, among other things:

(a) to retain and increase their dominant positions in the operation of telephone central offices and related transmission facilities in the respective states in which they are authorized to operate to the detriment of non-Bell operating companies; and

(b) to retain and increase their dominant positions in the supplying and servicing of telephone equipment located on customers' premises to the detriment of non-Bell interconnect companies.

8. In furtherance of the separate offenses charged in paragraph 6, the defendant, which is known as a Bell System Company, and the co-conspirators named in paragraph 9, also known as Bell System companies, gave force and effect to an agreement imposing restrictions on employment (hereinafter referred to as the no-switching agreement). Under the no-switching agreement Bell System companies would not hire persons employed by other Bell System companies while still employed by such other Bell System companies or for a period of six (6) months thereafter. While there did exist a procedure by which Bell System employees might transfer from one Bell System company to another, such procedure was subject to approval of both the

Bell System company an employee wished to transfer to and the Bell System company he wished to transfer from. A refusal by a current Bell System employer to grant approval precluded the possibility of a transfer. An employee of a Bell System company who did not, or for any reason could not, avail himself of the transfer procedure was unable to secure employment with another Bell System company within six (6) months of resigning Bell System employment due to adherence to the no-switching agreement by the defendant and named co-conspirators. The no-switching agreement was aimed at the plaintiff and others similarly situated and enabled the defendant and named co-conspirators, by virtue of their dominant positions in the telephone field, to exercise great control over the mobility of their employees.

9. Various corporations, not named as defendants herein, participated as co-conspirators with the defendant in the conspiracy charged herein. These corporations include the following:

American Telephone and Telegraph Company
New England Telephone and Telegraph Company
The Southern New England Telephone Company
New York Telephone Company
New Jersey Bell Telephone Company
The Bell Telephone Company of Pennsylvania
The Diamond State Telephone Company
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
Southern Bell Telephone and Telegraph Company
South Central Bell Telephone Company
The Ohio Bell Telephone Company

Cincinnati Bell
Michigan Bell Telephone Company
Indiana Bell Telephone Company
Illinois Bell Telephone Company
Northwestern Bell Telephone Company
Southwestern Bell Telephone Company
The Mountain States Telephone and Telegraph Company
Pacific Northwest Bell Telephone Company
The Pacific Telephone and Telegraph Company
Bell Telephone Company of Nevada
Western Electric Company

10. During the month of July, 1971 the plaintiff, while still in the employ of New York Telephone, attempted to obtain employment with the defendant as a switchman. The plaintiff, unable to work at that time due to a strike then being waged against New York Telephone, presented himself at the employment office of the defendant whereupon, pursuant to the no-switching agreement alleged in paragraph 8, defendant's employment representative refused to permit the plaintiff to fill out an application for employment.

11. On December 1, 1972 the plaintiff, after having resigned his employment with New York Telephone, again attempted to obtain employment with the defendant as a switchman. At that time the plaintiff was permitted to fill out an application for employment; however, such application was subject to the six (6) month waiting period required by the no-switching agreement.

12. Among the reasonably foreseeable effects of adherence to the no-switching agreement by the defendant and named co-conspirators have been:

(a) that the defendant and named co-conspirators have been unable to employ

persons formerly employed by Bell System companies within a six (6) month period, that the defendant and named co-conspirators have had to train inexperienced personnel for positions which otherwise could have been filled by such former Bell System personnel, and that as a consequence of such training defendant's operating costs have been increased along with resulting increase in prices to the detriment of the telephone using public;

(b) that knowledge of the no-switching agreement among Bell System personnel has created a reluctance among such personnel to seek employment with non-Bell operating companies because of the fear that if such non-Bell operating company employment does not work out such persons will be precluded from working for any Bell System company for a six (6) month period, that such a freezing of the telephone labor force has hindered non-Bell operating companies in obtaining qualified personnel to the detriment of such non-Bell operating companies, and that the possibility of failure of such non-Bell operating companies to remain in business has therefore increased raising the possibility of takeover of their operating areas by the defendant and named co-conspirators;

(c) that knowledge of the no-switching agreement among Bell System personnel has created a reluctance among such personnel to seek employment with various interconnect companies which are in competition with the defendant and named co-conspirators because of the fear that if such interconnect company employment does not work out such persons will be precluded from working for any Bell System company for a six (6) month period, and that such a freezing of the telephone labor force has hindered interconnect companies in obtaining qualified personnel to the detriment of such interconnect companies and to the advantage of

the defendant and named co-conspirators;

(d) that persons employed by Bell System companies have been unable to market their skills in a competitive manner among other companies of the Bell System and, as such, have been injured in their business and property within the meaning of Section 4 of the Clayton Antitrust Act (Title 15, United States Code, Section 15); and

(e) that persons formerly employed by Bell System companies have been unable to obtain employment with Bell System companies for a six (6) month period following their Bell System employment and, as such, have been injured in their business and property within the meaning of Section 4 of the Clayton Antitrust Act (Title 15, United States Code, Section 15).

13. As a direct result of the defendant's adherence to the no-switching agreement the plaintiff was precluded from employment with the defendant, the dominant telephone company in the state of Wisconsin, and was therefore effectively precluded from pursuing his occupation as a number 5 crossbar switchman in the state of Wisconsin:

(a) during the time in which he was still employed with New York Telephone;

(b) during the six (6) month period beginning October, 1972 when he resigned from New York Telephone; and

(c) during the time period which would have continued from the time periods stated in (a) & (b) above had the plaintiff not been barred from employment with the defendant during those periods.

The plaintiff has therefore been injured in his business and property within the meaning of Section 4 of the Clayton Antitrust Act (Title 15, United States Code, Section 15) by suffering loss of wages for the position of switchman with the defendant from July, 1971 to the present.

Wherefore, plaintiff prays:

That the herein alleged no-switching agreement between the defendant and named co-conspirators be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Antitrust Act (Title 15, United States Code, Sections 1 and 2) and in violation of Section 133.01 Wisconsin Statutes.

That the amount of damages plaintiff has sustained by reason of the unlawful acts of the defendant be ascertained and assessed according to defendant company's wage scales for the position of switchman from July, 1971 to the present and the defendant be ordered to pay to the plaintiff three (3) times the amount of such damages as provided by Section 4 of the Clayton Antitrust Act (Title 15, United States Code, Section 15).

That the plaintiff recover such other amounts and have such other and further relief as the Court shall deem just.

/s/_____

Steven A. Taterka
Plaintiff pro se

177 Loudon Rd., E-7
Concord, New Hampshire 03301
603 224-5627

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

- -

STEVEN A. TATERKA,
Plaintiff,
v.
WISCONSIN TELEPHONE CO.,
Defendant.

MOTION TO VACATE JUDGMENT

74-C-625

- -

Plaintiff, Steven A. Taterka, moves the court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure for an order vacating the judgment of this court entered March 5, 1976, dismissing plaintiff's amended complaint in the above-entitled action, and for leave to file a second amended complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

This motion is made on the grounds set forth in the plaintiff's brief to be filed by March 26, 1976.

Dated: March 13, 1976.

/s/_____
Plaintiff pro se

Steven A. Taterka
177 Loudon Rd.,Bldg.E,#7
Concord, New Hampshire
03301
603 224-5627

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

- -

STEVEN A. TATERKA,
Plaintiff,
v.
WISCONSIN TELEPHONE CO.,
Defendant.

76-1888

- -

May 4, 1977

ORDER

Plaintiff appeals from an order of the district court dismissing the antitrust count of his amended complaint and from an order denying his motion to vacate judgment to permit the filing of a second amended complaint. We affirm both orders of the district court.

I

We turn first to the question of whether the district court properly dismissed the antitrust count of the amended complaint. The subject of plaintiff's antitrust claim was an alleged agreement among Bell System companies under which such companies would not hire persons employed by other Bell System companies on the open market while they were employed by the other companies or for six months thereafter. Instead, a procedure existed whereby a Bell System employee could transfer from one company to another if both the target company and the company from which the employee wished to transfer approved. Plaintiff named as parties to the agreement the defendant and certain other Bell System companies, titled according to

the separate geographical areas they apparently served. Plaintiff alleged that, as a result of the defendant's adherence to the agreement, it was required at times to train inexperienced personnel instead of employing those already trained and that the increased training costs were passed on to the public in the form of higher prices for telephone service. Plaintiff, a switchman for the New York Telephone Company from November, 1970, to October, 1972, alleged that he tried to obtain employment directly from the defendant Wisconsin Telephone Company in July, 1971, and in December, 1972, and was denied such employment because of the defendant's adherence to the transfer procedure agreement. Plaintiff alleged that the agreement violated section 1 of the Sherman Act, 15 U.S.C. § 1, and that he sustained damages recoverable under section 4 of the Clayton Act, 15 U.S.C. § 15, by the loss of wages resulting from defendant's refusal to hire him.

The alleged agreement by its nature restrains the freedom of the named Bell System companies to compete for each other's workers. However, in Nichols v. Spencer International Press, Inc., 371 F.2d 332, 335-36 (7th Cir. 1967), we stated that the antitrust laws "were not enacted for the purpose of preserving freedom in the labor market, nor of regulating employment practices as such . . . ." See 15 U.S.C. § 17. Plaintiff in this appeal disclaims any contention that the Sherman Act was enacted as a measure to protect labor. We must therefore look beyond the labor market to determine whether the agreement had any proscribed anticompetitive effects. In Nichols, we articulated a distinction between agreements among employers which do no more than restrict freedom to enter into employment relationships and those "among supposed competitors" which "impair

full and free competition in the supply of a service or commodity to the public." Nichols v. Spencer International Press, Inc., supra at 336. The latter constitute violations of the antitrust laws notwithstanding the fact that the impairment of business competition is effected by agreements restraining competition for labor. See id.; Anderson v. Shipowners Ass'n, 272 U.S. 359 (1926); Union Circulation Co. v. FTC, 241 F.2d 652 (2d Cir. 1957).

Plaintiff concedes that the companies party to the challenged agreement were not competitors in the delivery of telephone service to the public. He argues nevertheless that it is not the status of the parties as competitors, but the effect of the agreement on commerce, that determines whether the agreement violates the Sherman Act. While this assertion is in a broad sense true, an agreement among business interests does not violate the Sherman Act unless it impairs business competition. Standard Oil Co. v. United States, 221 U.S. 1 (1911). In Radovich v. National Football League, 352 U.S. 445 (1957), on which plaintiff relies, the defendant was required to face trial on an allegation that it had secured compliance with a blacklist of the plaintiff from the San Francisco Clippers, a member of the noncompeting Pacific Coast League. However, the blacklist was allegedly part of a conspiracy to boycott players of the All-America Conference, a competitor of the National Football League. Thus, the effect of the agreement between noncompetitors in Radovich was anticompetitive. The only effect on commerce cited in the amended complaint as resulting from the defendant's adherence to the agreement is an alleged increase in the price of the defendant's telephone service resulting from the increased cost of its training new personnel. In accordance with the principle just stated,

an increase in price does not signal illegality under the Sherman Act unless it can be traced to an agreement restraining business competition. Because the named parties to the alleged agreement were not business competitors, no such restraint could exist as among themselves. No third-party competitors of the Bell System companies are alleged to have been affected by the agreement in the amended complaint.

We therefore conclude that the district court was correct in its judgment that no violation of section 1 of the Sherman Act was stated by the amended complaint, and we affirm its order of dismissal.

II

We turn then to the question of whether the district court abused its discretion in denying plaintiff's motion to vacate judgment to permit the filing of a second amended complaint. We hold that the court's action was proper for two reasons: first, because the plaintiff had been given a prior opportunity to cure the defects in his complaint; and second, because filing of the second amended complaint would have been futile.

The district court dismissed the antitrust count of plaintiff's original complaint in part because it contained no factual allegations

> that competition /was/ impaired, that any trade or commerce /was/ affected, that any underlying anticompetitive agreement /was/ implemented by the alleged "no-switching" agreement, or that a contract was made or a conspiracy existed between competitors.

The court dismissed the plaintiff's amended complaint for the same reason, stating, "I

am unable to find in the amended complaint a cause of action alleging impact upon competition or a conspiracy between competitors."

Leave to amend a complaint must be freely given "when justice so requires." Fed. R. Civ. P. 15(a). In the absence of undue prejudice to the defendant by allowance of the amendment, the plaintiff must be afforded an opportunity to test his claim on the merits "/I/f the underlying facts or circumstances relied upon by /the/ plaintiff may be a proper subject of relief. . . ." Foman v. Davis, 371 U.S. 178, 182 (1962). If the plaintiff has failed once to state facts essential to the maintenance of his action, he must be afforded an opportunity to cure the defects by amendment. Austin v. House of Vision, Inc., 385 F.2d 171 (7th Cir. 1967). In the instant case, plaintiff failed not once but twice to allege facts indicating that the alleged agreement impaired competition. The defects in plaintiff's original complaint were stated with particularity by the district court in its decision and order of May 1, 1975. Plaintiff thereafter had an opportunity to cure the defects by submission of his amended complaint. After he failed to do so, justice did not require that he be allowed to try again. Although plaintiff is a pro se litigant, he admitted at oral argument that he is not indigent. We do not believe the district court was required to alter its judgment in light of plaintiff's lack of formal assistance.

Finally, in considering a motion to vacate judgment to allow the filing of an amended complaint, the district court may examine the proposed complaint to determine whether a filing would be futile. Foman v. Davis, supra at 182. Our examination of the second amended complaint persuades us that the defect con-

tained in the original and amended complaints was not cured by it. The heart of the second amended complaint is an allegation that non-Bell operating companies and certain "interconnect" companies in competition with the defendant were placed at a competitive disadvantage by the challenged agreement. In essence, plaintiff alleges that the agreement created a reluctance among Bell System employees to leave for work at non-Bell and interconnect companies for fear they would not be able to obtain work again at a Bell System company for the next six months. We believe this allegation is entirely too speculative to support an antitrust action.

The agreement as alleged did not interfere with the freedom of Bell System employees to leave or return to the company for which they worked. The only obstacle to their mobility was in transfer from one Bell System company to another, whether or not they took work elsewhere in the interval. In Union Circulation Co. v. FTC, 241 F.2d 652 (2d Cir. 1957), on which plaintiff heavily relies, an agreement among magazine subscription selling agencies not to hire salesmen employed by each other at any time during the preceding year was held to be anticompetitive, because it placed newly formed competing agencies at a disadvantage. Because of the apparently substantial chance that such agencies might not survive for a year, the court noted that salesmen who contemplated joining such agencies would naturally hesitate in the face of the risk that they could be out of work for a year if the new agencies should fail. Plaintiff does not allege that the existing non-Bell operating companies or interconnect companies faced a substantial chance of going out of business within six months at any given time or that any new companies might be formed with a similarly limited chance of survival. A Bell System employee

contemplating a move to a non-Bell operating company or an interconnect company does not appear to have faced a substantial, objective risk that he would be out of work within six months and precluded from further employment among Bell System companies as a result of the challenged agreement. Accordingly, the facts alleged in the second amended complaint do not support the plaintiff's theory that non-Bell operating companies and interconnect companies were placed at a competitive disadvantage by the agreement. The second amended complaint does not state a violation of the Sherman Act, and its filing would have been futile.

III

For the reasons stated above, the order dismissing the amended complaint and the order denying plaintiff's motion to vacate judgment are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

- -

STEVEN A. TATERKA,
Plaintiff,
v. # 76-1888
WISCONSIN TELEPHONE CO.,
Defendant.

- -

June 14, 1977

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by the plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

- -

STEVEN A. TATERKA,
Plaintiff,
v. # 74-C-625
WISCONSIN TELEPHONE CO.,
Defendant.

- -

DECISION and ORDER

In a decision and order dated May 1, 1975, this court ordered dismissal of the plaintiff's complaint, without prejudice. The plaintiff subsequently filed an amended complaint and, once again, the defendant has moved to dismiss. Briefs have been submitted by both sides.

[Portion not relevant to antitrust claim is omitted.]

In the second cause of action, the plaintiff urges that a no-switching agreement exists between the companies of the Bell System and that such agreement constitutes a conspiracy in constraint of trade. The main thrust of Mr. Taterka's second cause of action, as stated in the amended complaint is as follows:

> "23. The defendant is the dominant telephone company in the state of Wisconsin operating approximately seventy-two percent (72%) of the telephones in the state. Because of the defendant's dominant position, the plaintiff was effectively precluded from pursuing his occupation in the state of Wisconsin

and thereby suffered injury to his business and property within the meaning of Section 4 of the Clayton Act (Title 15, United States Code, Section 15).

"24. By adherence to the no-switching agreement, the defendant and named co-conspirators imposed restrictions on their freedom to hire personnel. As such, they put themselves into a situation of restraint upon their ability to carry on interstate commerce.

"25. As a further result of the defendant's adherence to the no-switching agreement, the defendant has had to train inexperienced personnel for the position of switchman rather than employing those already trained. This has resulted in increasing training costs being borne by the defendant and, consequently, higher prices to the telephone using public."

In the order of May 1, 1975, I noted that the complaint contained no factual allegations that competition was impaired or trade and commerce affected by the alleged no-switching agreement and that the allegations of a conspiracy were not supported by factual allegations. The amended complaint remains subject to the same deficiency in that plaintiff has still failed to set forth in his amended complaint any injury incurred by reason of anything forbidden in the anti-trust laws. There are no factual allegations tending to suggest that the defendant's conduct affected anyong except the defendant and its employees. The allegations of paragraph 25, recited above, are remote and conclusory. I am unable to find in the amended complaint a cause of action alleging impact upon competition or a conspiracy between competitors.

Cf. Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967).

It is my conclusion that the amended complaint does not contain adequate factual allegations of anti-competitive effect or effect on the public interest. The plaintiff's allegations as to employment practices as distinguished from restraint of trade are not sufficient to withstand the defendant's motion to dismiss.

Therefore, IT IS ORDERED that the defendants motion to dismiss be and hereby is granted.

IT IS ALSO ORDERED that the plaintiff's action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 5 day of March, 1976.

/s/Myron L. Gordon
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

- -

STEVEN A. TATERKA,
Plaintiff,
v. # 74-C-625
WISCONSIN TELEPHONE CO.,
Defendant.

- -

DECISION and ORDER

[Portion not relevant to antitrust claim is omitted.]

In his second cause of action, Mr. Taterka alleges that

> "an agreement exists between Bell System companies that they will not hire persons employed by other Bell System companies while still employed by such other Bell System companies or for a period of six months thereafter and that such [a "no-switch"] agreement constitutes a conspiracy in restraint of trade and is therefore illegal under Title 15, United States Code, Section 1 et seq."

This matter is before me on the defendant's motion to dismiss pursuant to Rules 12(b)(1) and (6), Federal Rules of Civil Procedure. Because "matters outside the pleading" have been "presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." See Rule 12(b)(6).

[Portion not relevant to antitrust claim is omitted.]

In his second cause of action, the plaintiff challenges the legality under the antitrust laws of an alleged "no-switching" agreement which, according to paragraphs 30 and 31 of the complaint, exists between Bell System companies and provides as follows:

> "that Bell System companies will not hire persons employed by other Bell System Companies while still employed by such other Bell System companies or for a period of six (6) months thereafter."

The plaintiff asserts in paragraphs 28 and 29 of his complaint that, in reliance upon the existence of such a "no-switching" agreement, the defendant "refused to permit him to fill out employment application forms" during the month of July, 1971 (when he was still employed by New York Telephone Company). Assuming arguendo the existence of such an agreement, I conclude that no violation of the antitrust laws is set forth as a matter of law and that the second cause of action should also be dismissed. Rule 12(b)(6), Federal Rules of Civil Procedure.

15 U.S.C. § 17 states in pertinent part that "The labor of a human being is not a commodity or article of commerce." Furthermore, the complaint contains no factual allegations that competition is impaired, that any trade or commerce is affected, that any underlying anti-competitive agreement is implemented by the alleged "no-switching" agreement, or that a contract was made or a conspiracy existed between competitors. See Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967); Miller v. Kimberly-Clark Corporation, 339 F.Supp. 1296 (E.D. Wis. 1971). The plaintiff concludes in paragraph 33 of the complaint that the alleged "no-switching" agreement alone

"constitutes a conspiracy in restraint of trade." However, this conclusion is not supported by the factual allegations or the law.

Significantly, the complaint reveals that the plaintiff resigned from New York Telephone Company in October, 1972 (para. 8d) and that in November, 1972 (Exhibit A), or on or about December 1, 1972 (para. 5), he submitted an application for employment to the defendant. The plaintiff nowhere alleges that the defendant's acceptance of this application was conditioned on a six-month waiting period, or that he was then told that he could not be hired for six months after his resignation from the New York company. As a matter of fact, he states in Exhibit A:

> "At the time I was told I would be contacted if anything became available."

Acceptance by the defendant of Mr. Taterka's application--under these circumstances alleged by the plaintiff himself--undercuts his allegation that the alleged "no-switching" agreement existed.

Therefore, it is ordered that the defendant's motion to dismiss be and hereby is granted.

It is also ordered that this complaint be and hereby is dismissed, without prejudice.

It is further ordered that this action be and hereby is dismissed unless, within 30 days from the date of this order, the plaintiff files an amended complaint.

Dated at Milwaukee, Wisconsin, this 1st day of May, 1975.

/s/Myron L. Gordon
U.S. District Judge

June 30, 1976

Mr. Steven A. Taterka
Post Office Box 971
Milwaukee, Wisconsin 53201

Douglas L. Reed
Attorney at Law
722 North Broadway
Milwaukee, Wisconsin 53202

Re: Taterka v. Wis. Telephone Co.
74-C-625

Gentlemen:

On June 29, 1976, Judge Gordon denied the plaintiff's motion to vacate judgment by writing the words:

> "Motion denied.
> Myron L. Gordon
> U.S. Dist. Judge
> June 29, 1976"

on the face thereof.

Very truly yours,

/s/
Dennis M. Grzezinski
Law Clerk to Judge Gordon

DMG:bp